IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5382

WILLIE JASPER DARDEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

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CITATION TO THE OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Florida are reported at 329 So.2d 287 (Fla. 1976), and are set out in the appendix (A. 158-72).[1]

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[1] References preceded by the letter "A" are to pages of the printed appendix; those preceded by the letter "R" are to pages of the typewritten record on appeal to the Supreme Court of Florida.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on February 18, 1976; the court denied rehearing on April 19, 1976. On July 8, 1976, Mr. Justice Powell, who had earlier issued a stay of execution of the death sentence imposed upon petitioner, granted petitioner's request for an extension of time to file a petition for a writ of certiorari to September 16, 1976. The petition was filed on September 15, 1976; certiorari and leave to proceed *in forma pauperis* were granted on November 1, 1976.

Petitioner asserted below and asserts here the deprivation of rights secured to him by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Was petitioner's right to a fair trial denied to him by the prosecution's flagrantly irrelevant and inflammatory summation to the jury, when the misconduct was (i) repeated and persistent, (ii) intentional, (iii) unremedied by a curative instruction from the court, notwithstanding defense counsel's objection, (iv) unprovoked by defense counsel, and (v) of probable importance in persuading the jury to convict and to recommend imposition of a death sentence upon evidence of guilt that was far from overwhelming?

2. Was petitioner deprived of a federal constitutional right by testimony on the state's direct case of a one-to-one identification that occurred at a preliminary hearing, when this earlier identification had been both wantonly and needlessly suggestive?

3. Was petitioner deprived of rights accorded him by the Constitution by reason of two in-court identifications, both of which may have been the product of impermissibly and needlessly suggestive pretrial identifications?

4. Were petitioner's constitutional rights infringed by the exclusion for cause of veniremen who acknowledged that to vote to recommend that petitioner be sentenced to death would violate their moral and religious principles?

STATEMENT OF THE CASE

A. The crime and the evidence at trial

Early in the evening of September 8, 1973, Carl's Furniture Store in Lakeland, Florida was held up, one of its owners, Carl Turman, was shot and killed as he entered through a back door, and Phillip Arnold, a sixteen-year-old boy who lived nearby, was shot and wounded as he sought to give aid to Mr. Turman (A. 24-30, 65-70). At about the time of these events, petitioner, on weekend furlough from a Florida prison, lost control of his girlfriend's car as he drove toward her house in Tampa and struck a telephone pole adjacent to the highway (R. 331-32, 574-77, 600). The accident took place a little over three miles from the furniture store (R. 508, 539).

A few hours thereafter, petitioner was arrested at the home of his girlfriend for leaving the scene of an accident. Later the same night, he was charged with the murder of Mr. Turman, the attempted murder of Mr. Arnold, and the robbery that accompanied these shootings (R. 586). Following a change of venue to rural Citrus County (R. 138), Mr. Darden was tried for

first degree murder and the other, lesser crimes in mid-January 1974.

The principal evidence proffered by the state was two-fold: the identification of petitioner by Mrs. Turman and Mr. Arnold (A. 36-37, 96-97), both of whom had furnished descriptions of the assailant immediately after the crime that differed markedly from petitioner's appearance, and testimony from a deputy sheriff who, on the day following the crime, had found a .38 caliber pistol in a ditch more than thirty feet from the highway and about an equal distance from the place of the automobile accident the evening before (R. 503-04, 511). The pistol was shown at trial to be of the same caliber as the murder weapon and to have had four bullets fired from it, but was not connected to the crime by ballistic or other evidence of a more definitive character (R. 357-58, 514, 517-22).

Petitioner testified at length on his own behalf (R. 571-659) and told how his automobile had skidded from the highway in wet weather as he hastened back to Tampa from Lakeland to meet his girlfriend and attend a wedding later on in the evening (R. 574-76). Both he and witnesses called by the state explained that, with the aid of a passing motorist, he had sought unsuccessfully but with seeming equanimity to locate a wrecker to take the disabled auto in tow and, having failed in this effort, had obtained a ride to Tampa (R. 577-579, 330-31, 334-35, 340-41). Petitioner denied that he had been at the furniture store or had had anything to do with the crimes with which he was charged (R. 592-93, 598-99).

Mr. Darden's recitation of the events of the evening of September 8 was neither implausible in itself nor, apart from the identification testimony of Mrs. Turman and Mr. Arnold, was it in direct conflict with the state's evidence.

In sum, at the close of the evidence, the prosecution's case for conviction was a doubtful one and depended, in overwhelming measure, upon the jury's acceptance of the identification testimony of the state's two principal witnesses. With this uncertainty, the summations to the jury took on particular importance.

B. The summations and the conviction

Seemingly recognizing that a summation confined to marshalling the evidence and considering the inferences to be drawn from it might fail to elicit a conviction, Mr. McDaniel, the second of the two prosecutors to address the jury, devoted the bulk of his closing argument to matters wholly irrelevant to the question of petitioner's guilt or innocence. Even upon a cold written record, the text of the summation itself virtually compels the conclusion that the prosecutor's chosen objective was to distract the jurors from the proper performance of their task and to impel them to return a verdict based upon passion and animosity. If ever a prosecutorial summation may so overstep the bounds of legitimate argument as to deprive a defendant of a fair trial, McDaniel's summation here did so.

Within less than thirty-five transcript pages, the prosecutor time and again focused the jurors' attention upon the Florida Division of Corrections as that "unknown defendant" who, through the weekend furlough granted to petitioner, had turned him loose "on the public" (A. 121-22, 128-29); invited a conviction for first degree murder and the recommendation of a death sentence as "the only way that I know that he [the defendant] is not going to get out on the public" (A. 123); and expressed his "wish that the

Division of Corrections was sitting in the chair [as a co-defendant] with him [Darden]" (A. 137).

Another theme repeatedly voiced was McDaniel's own hatred of petitioner. Time after time he sought to infect the jurors with his own animosity, wishing out loud that Darden had "blown his [own] face off," "cut his [own] throat," "blown his [own] head off," or "been killed in the [auto] accident." (A. 125-26, 133, 136).

Repeatedly also, the prosecutor put his own opinions as to petitioner's credibility in issue, explaining to the jury that, were he in Darden's position, he would also "lie until my teeth fall out" (A. 124). In like vein both McDaniel and his co-prosecutor emphasized to the jury their personal beliefs that petitioner was guilty. "I don't believe anything he [Darden] says" (A. 131), McDaniel announced, and "I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer," prosecutor White told the jurors. "I will be convinced of that the rest of my life," he concluded (A. 120).

Beyond any doubt, these and numerous other flagrantly irrelevant and inflammatory remarks by the prosecution were the product not of mischance but of calculation, were unprovoked by any conduct of the defendant or his counsel, and were permitted by the trial court to proceed unrestrained, despite objection.[2]

Following the summations, the jury brought in a verdict of guilty on all counts and, in the second half of the bifurcated trial, recommended that petitioner be sentenced to death, a recommendation embraced by the trial judge.

On appeal, the Supreme Court of Florida affirmed petitioner's conviction and sentence by a five-to-two

[2]The text of the prosecutors' summations is set out at pages 116-37 of the appendix.

vote. *Darden v. State*, 329 So.2d 287 (Fla. 1976). The majority, though acknowledging that the prosecution's remarks and summation "under ordinary circumstances would constitute a violation of the Code of Professional Responsibility" and "would have possibly been reversible error," concluded that the heinousness of the crimes transformed the prosecutors' tactics into "fair comment." 329 So.2d at 290 (A. 162-63).

The dissenting justices, on the other hand, urged that, by reason of the prosecution's misconduct, petitioner was entitled to a new trial, both as a matter of state law and under the command of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. 329 So.2d at 291-95 (A. 164-72).

C. The identification testimony

As we have said, the identifications of petitioner by Mrs. Turman and Mr. Arnold were crucial to the prosecution's case. We describe here how Mrs. Turman was permitted to testify on the state's direct case about her initial one-to-one identification of the defendant at a preliminary hearing. We also show how the in-court identifications of both witnesses were infected by needlessly and impermissibly suggestive pretrial identifications.

i. Mrs. Turman's identification of petitioner

According to Mrs. Turman, she was alone in the furniture store just prior to closing time on the evening of the crime (A. 24). A heavy-set black man had come in, ostensibly to look for used furniture for some

apartments (A. 24-25). After examining a variety of furniture and appliances, the customer appeared to leave the store, only to return in a moment's time, pistol in hand, demanding the money in the cash register (A. 26-27, 48-49). Mrs. Turman testified that, as she and the robber moved toward the back of the store, her husband entered through the rear door and was shot down in his tracks as she cried out a warning to him (A. 27-18).

A threatened sexual assault followed, but almost immediately Phillip Arnold, who lived just a few houses away from the furniture store, pushed open the back door, saw the prostrate Mr. Turman and squatted down to give aid to him (A. 28-31, 65-68). Within a few seconds, however, the assailant moved toward Mr. Arnold, shot him in the mouth as he looked up from his squatting position, and shot him again in the neck as he turned to flee (A. 30-31, 68-70). A third bullet struck Mr. Arnold from the rear as he ran toward his home and the gunman hastened out of the store behind him (A. 69-70).

All told, according to Mrs. Turman, she was in the presence of the robber for perhaps ten minutes, while Mr. Arnold testified that he saw the gunman for no more than twenty or twenty-five seconds, during a portion of which his attention was focused upon the body of Mr. Turman (A. 40, 48, 98-100).

Within an hour or two of the crime, Mrs. Turman described the attacker to a deputy sheriff as a heavy-set, clean-shaven black man, approximately 200 pounds, with a fat face and of her own height – five foot, six inches – wearing a dark-colored pullover sports shirt (Suppression hearing, 57; A. 37-38, 44-45). When asked by the deputy whether she would be able to identify the criminal upon sight, she replied, "I would try, I would try; I might – I don't know" (A. 45-46).

In contrast to this description, the trial testimony showed that petitioner was five feet, ten or eleven inches tall and weighed approximately 170 to 175 pounds (R. 596). Moreover, one of the state's witnesses, a motorist who had stopped at the scene of the auto accident that occurred, according to the prosecution's theory, when petitioner was fleeing the scene of the crime, testified that petitioner was wearing a white or greyish shirt that buttoned down the front and that he had a moustache (R. 311, 313, 318-20).

In view of these contradictions, the gratuitously unfair circumstances of Mrs. Turman's pretrial identification of petitioner are particularly significant.

Although, as we have noted, petitioner was arrested and charged with Mr. Turman's murder and the other crimes within a half-dozen hours of the event, the authorities inexplicably did not request Mrs. Turman to identify Darden in a line-up or in any other fashion until some four days later (R. 586; A. 37, 32). The identification that then occurred took place during Mrs. Turman's testimony at a preliminary hearing (A. 6-12), as petitioner sat with his counsel at the defense table – apparently the only black man among the few people in the courtroom (A. 51-54).

Mrs. Turman's testimony itself highlighted the suggestiveness of the circumstances of the identification. Asked by the court at the preliminary hearing whether she was sure that the man at the defense table was the assailant, she replied that "even with his back to me while I sat [at the rear of the courtroom] I reached over and touched my sister's hand and said, 'That's him' " (A. 11).

At trial, Mrs. Turman was permitted once again to identify petitioner as he sat at the defense table. To buttress this identification, the prosecution also brought out, on direct examination, the earlier identification

that she made. The prosecution questioned Mrs. Turman thus:

"Q. Do you remember when the funeral [of Mr. Turman] was?
A. Yes, sir, September 13th, on a Wednesday.
Q. You say you saw Mr. Darden the day after?
A. Yes, sir.
Q. Where was that?
A. At the preliminary hearing.
Q. Did you have any trouble identifying him on that date?
A. I did not.
Q. And again, you're absolutely positive?
A. Yes, sir." (A. 37).

ii. Mr. Arnold's identification of petitioner

In contrast to Mrs. Turman, Mr. Arnold was not permitted to tell the jury of his pretrial identification of petitioner (A. 95). Nonetheless, the reliability of his in-court identification was also marred by a wantonly and needlessly suggestive photo identification not long after the crime.

On September 11, 1973 – after counsel had been appointed for petitioner – two sheriff's deputies visited Mr. Arnold in the hospital, where he was recovering from his bullet wounds (A. 87-88, 72). According to Mr. Arnold's testimony, elicited out of the presence of the jury, he had by this time already read newspaper stories about the crime which almost certainly recounted the arrest of a suspect and his identity (A. 78-79).

The deputies, Mr. Arnold recalled, had shown him six photographs and asked whether he could identify his assailant from among them (A. 72-73, 88). Four he immediately rejected out of hand, for "they didn't look anything at all like him" (A. 74, 77-78). From the two

remaining photographs, Mr. Arnold selected that of petitioner (A. 74-75). The testimony disclosed, however, that his ability to make this choice was less than startling, for the picture of petitioner bore the name "Darden" and the date of his arrest, "9-9-73," facts of which Mr. Arnold was almost assuredly already aware (A. 76, 89).

Not long after this tainted identification, petitioner asked that Mr. Arnold be asked to identify him in a properly conducted line-up, but the prosecuting authorities refused the request (A. 94; R. 591).

D. The exclusion of death-scrupled veniremen

The trial court excluded five prospective jurors from petitioner's venire on the basis of their expressed convictions against the death penalty. Petitioner submits that at least two of these exclusions were patently inconsistent with *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and denied petitioner rights protected by the Due Process and Equal Protection clauses of the Fourteenth Amendment. The material portions of the jury selection proceeding are set forth in the appendix (A. 13-23).

SUMMARY OF THE ARGUMENT

Petitioner's conviction and death sentence must be set aside for several separate reasons.

I. As the Court has often recognized, prosecutorial misconduct before or during trial may involve such a probability of prejudice to a defendant as to constitute a denial of due process. Here, however narrow the

scope of review, the prosecution's wilfully irrelevant and inflammatory summation in a capital case in which the evidence of guilt was sharply contested deprived petitioner of a fair trial.

In *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), the Court identified a number of factors pertinent to a decision whether improper statements by the prosecution in closing argument are so likely to have influenced the jury's judgment as to infringe the defendant's constitutional rights. In contrast to the circumstances that prevailed in the *DeChristoforo* case, the prosecution's misconduct here pervaded the entire summation, was plainly intentional, was unprovoked by defense counsel and was unremedied by the trial court, despite objection. If the Due Process Clause of the Fourteenth Amendment imposes any limitations on prosecutorial conduct during closing argument, those bounds were surely exceeded by the state's attorneys in the present case.

II. Petitioner was deprived of due process of law by the admission in evidence upon the state's direct case of testimony as to a gratuitously suggestive pretrial identification. Several considerations compel the exclusion of such evidence without regard to the reliability of the identification. First, the reliability of evidence of a needlessly suggestive pretrial identification is almost always uncertain; moreover, the reliability of such evidence is inherently not susceptible to verification. Second, a rule of automatic exclusion will deter police from utilizing improper identification procedures. Third, such a rule will free the courts from elusive inquiries into the reliability of needlessly suggestive identifications. Together, these benefits outweigh the minimal interference with law enforcement consequent upon adoption of a *per se* rule and the resulting occasional exclusion of pretrial identification evidence that is, in

fact, of probative value, notwithstanding the uncertainty of its reliability and the gratuitiously suggestive circumstances in which it was elicited.

However, even if measured under a totality-of-the-circumstances standard, the identification evidence at petitioner's trial should have been excluded as unreliable under *Simmons v. United States*, 390 U.S. 377 (1968).

III. At the commencement of petitioner's trial, two prospective jurors were excused from the venire for cause by reason of their expression of tentative, abstract opposition to capital punishment. Because these veniremen were dismissed without inquiry sufficient to determine whether, notwithstanding the evidence or the court's instructions concerning the law, they would refuse to make an impartial decision as to the defendant's guilt or would automatically vote against imposition of a death sentence, their exclusions were inconsistent with the rules laid down by the Court in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The sentence of death imposed upon petitioner should, therefore, be set aside.

ARGUMENT

I.

THE PROSECUTION'S SUMMATION WAS SO SATURATED BY INFLAMMATORY AND IRRELEVANT ARGUMENT THAT PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

This Court has frequently recognized that the circumstances of a state criminal trial or the prosecution's conduct at trial may so prejudice a defendant as

to deprive him of his constitutional right to a fair trial. *E.g., Miller v. Pate,* 386 U.S. 1 (1967); *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *Estes v. Texas,* 381 U.S. 532 (1965); *Turner v. Louisiana,* 379 U.S. 466 (1965); *Brady v. Maryland,* 373 U.S. 83 (1963). Though some such rulings find their foundation in specific guarantees of the Bill of Rights, *e.g., Chambers v. Mississippi,* 410 U.S. 284 (1973), many others have been predicated upon the Due Process Clause of the Fourteenth Amendment alone. As the Court stated in *Estes v. Texas, supra,* 381 U.S. at 542-43: "[A]t times a procedure employed by the state involves such a probability that prejudice will result that it is deemed inherently lacking in due process."

The principles underlying these decisions are as applicable during closing arguments as at the other stages in a criminal prosecution. *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974). "It may be," Justice Marshall stated for the Court in *Frazier v. Cupp,* 394 U.S. 731, 736 (1969), "that some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable." While we are cognizant that this Court has not heretofore set aside any state court conviction because of the misconduct of the prosecution during summation, implicit in these rulings, as well as in others reviewing the conduct of federal prosecutors, *e.g., Viereck v. United States,* 318 U.S. 236 (1943); *Berger v. United States,* 295 U.S. 78 (1935), is the recognition that a closing argument may so descend into prejudicial irrelevancies or may so be infected by inflammatory discourse as to destroy the atmosphere necessary for the jury to conduct its deliberations fairly and impartially. See *Sheppard v. Maxwell, supra; Estes v. Texas, supra; Irvin v. Dowd,* 366 U.S. 717, 722 (1961).

To be sure, the standard of review here is "'the narrow one of due process'" and "not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice.'" *Donnelly v. DeChristoforo, supra,* 416 U.S. at 642, quoting in part from *Lisenba v. California,* 314 U.S. 219, 236 (1941). Still, we submit that the verdict in this capital case – infected as it was by a summation designed to incite the jurors to reach their verdict in a mood of anger and hatred toward the defendant and by consideration of matters wholly irrelevant to his guilt or innocence – should not be permitted to stand, even under this narrow scope of review.

We first scrutinize the prosecution's summation in detail and then measure it against the criteria employed by the Court in *Donnelly v. DeChristoforo, supra,* in determining whether the improprieties there alleged worked to deprive the defendant in that case of the right to a fair trial. We conclude this point by a brief consideration of the state's claim of harmless constitutional error.

A. The state improperly attempted to try petitioner for "offenses" of the state Division of Corrections

Prosecutor McDaniel, the second of the state's attorneys to sum up to the jury, argued repeatedly and at length that the jurors should not limit themselves to consideration of petitioner's guilt or innocence of the crimes charged in the indictment, but should convict him of first degree murder because the state Division of Corrections, which had authorized petitioner's weekend

furlough, could not be trusted to keep him in prison under any other circumstance. "As far as I am concerned," McDaniel began, "there should be another Defendant in this courtroom . . . and that is the division of corrections, the prisons" (A. 121). He continued:

> "As far as I am concerned . . . this animal was on the public for one reason. Because the division of corrections turned him loose, lets him out, lets him out on the public. Can't we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?" (A. 121)
>
> * * *
>
> "I wish that person or persons responsible for him being on the public was in the doorway instead of [the murder victim]. I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of [Phillip Arnold].
>
> Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them." (A. 121-22)
>
> * * *
>
> "Mr. Turman is dead because that unknown defendant we don't have in the courtroom allowed it. He is criminally negligent for allowing it." (A. 122)
>
> * * *
>
> "There is one person on trial, not the Polk County Sheriff's Office, not the Hillsborough Sheriff's office, but he and his keepers, the Division of Corrections." (A. 128)

Mr. McDaniel's last words to the jury repeated this theme: "I cannot help but wish that the Division of Corrections was sitting in the chair with him [the defendant]. Thank you" (A. 137).[3]

These inflammatory comments bore no rational relationship to the question of petitioner's guilt or innocence of the crimes with which he was charged in the indictment, the only offenses for which the state had a right to try him. Yet the trial court allowed the prosecution to argue to the jury at length that petitioner should be punished for an offense supposedly committed by the Florida Division of Corrections – an offense not charged in the indictment and one as to which no evidence had been presented.

A recent federal district court decision upon a state prisoner's application for habeas corpus dealt with a similar prosecutorial tactic. In *Malley v. Connecticut*, 414 F. Supp. 1115 (D. Conn. 1976) (appeal pending), the state's attorney had argued in his summation to the jury that the defendant should be convicted not merely by reason of the illicit drug transaction portrayed by the evidence but also because his conviction would strike a blow against the "Greenwich Village drug scene." In setting aside the conviction and issuing the writ, the court reasoned that the "obvious purpose of these remarks was to tell the jury that they could in some way strike out at 'the drug scene' or stamp out 'the drug problem' by convicting the petitioner." 414 F. Supp. at 1120. The court concluded that the prosecution's conduct constituted "a conscious attempt to prejudice the jury" in favor of conviction "as an

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[3] *See also* McDaniel's argument at A. 129: "He's even got a driver's license. Why in the world does–what in the world is a State prisoner doing with a driver's license? I wonder if the public is paying for it."

exhibition of their feelings toward" the so-called drug scene. *Ibid.*

McDaniel engaged in misconduct allied to that discussed above in urging during the guilt-determining stage of the bifurcated trial that the jury recommend imposition of the death penalty upon petitioner. The prosecutor's remarks were nothing less than a warning to the jury that the only way to assure that petitioner would not before long be free from jail was to recommend a death sentence; for that reason, he urged that the jurors find petitioner guilty of first degree murder rather than of any of the lesser offenses with which petitioner had been charged.

> "That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose – this man served his time and if this man served his time as the Court has sentenced him, that's fine. If he's rehabilitated, fine. But let him go home on furloughs, weekend passes – not home, strike that, excuse me – go over with his girl friend for the weekend, go shoot pool for the weekend, go sell his guns, or gun, for the weekend, go consume drink in the bars over the weekend." (A. 123)

This inflammatory line of argument drew the jury's attention to an issue wholly immaterial to the determination of petitioner's guilt. Implicit in it was the contention that, were petitioner convicted of anything less than first degree murder and were he not put to death, he would serve only a short sentence or would be given furloughs and let "out on the public" again. Not only was this argument inflammatory and irrelevant to the issue of petitioner's guilt or innocence, but nothing in the record suggested that any such consequences would follow from a conviction for

offenses less than first degree murder. The prosecution nonetheless made this contention a central issue in summation and asked the jury to accept this "factual" premise on the prosecution's authority alone.

Such an argument, like the prosecutor's diatribe concerning the Division of Corrections, contributed nothing of legitimate concern to the jurors and could have had no effect other than to arouse their prejudices and distract them from their obligations. The prosecutor thus overtly encouraged violation of the rule that verdicts must be based upon the evidence and not upon appeals to emotion.

In *Bruce v. Estelle*, 483 F.2d 1031 (5th Cir. 1973), the Court of Appeals ordered the district court to grant a writ of habeas corpus because of a similarly improper prosecutorial summation. The Court held an earlier state competency proceeding constitutionally defective in substantial part because of the "highly inflammatory and prejudicial comments of the state counsel's closing arguments to the jury." 483 F.2d at 1039. Counsel had argued, incorrectly, that if the jury were to find that petitioner had been insane at the time of his trial he could not now be retried. " 'If you want him walking the streets of your county, you go ahead and let him out; find him insane at the time of his trial and you will have effectively let him out of prison. That's what you are facing in your decision in this trial.' " *Id.* at 1040. The language of the Court of Appeals in that case is fully applicable here:

> "Such emotional, erroneous and prejudicial comments have no place in a dispassionate resolution of the question whether [petitioner] was competent in 1965 to stand trial.
>
> These comments most probably infected the whole decision-making process of the jury. State counsel knew that [petitioner] could be retried and his

assertion to the jury that he could not was erroneous. Such irrelevant diatribes cannot be countenanced." *Ibid.*

B. The state sought to prejudice the jurors by appealing improperly to their emotions

McDaniel's repeated expression during summation of his wish that Darden had been maimed or killed further contributed to the denial of petitioner's constitutional right to a fair trial. Over and over again, the prosecutor made comments like the following:

> "I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him [petitioner] sitting here with no face, blown away by a shotgun, but he didn't. . . . I wish someone had walked in the back door and blown his head off at that point." (A. 125-26)

McDaniel returned to this theme when he described the five times that the alleged murder weapon had been fired. He explained that this left one bullet in the chamber. "[Darden] didn't get a chance to use it. I wish he had used it on himself" (A. 133). He made a similar comment in describing petitioner's automobile accident: "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time" (A. 134). Finally, while discussing the claim that petitioner had changed his appearance between the date of the crime and that of the trial, McDaniel gratuitously commented that "[t]he only thing he hasn't done that I know of is cut his throat" (A. 136).

It should require no citation to authority to establish that the repetition of this theme grossly exceeded the limits of permissible argument. The quoted statements

were nothing more than a calculated attempt by the prosecution to transmit its hatred of petitioner to the jurors and to make that hatred a factor in their decision-making. See *United States ex rel. Haynes v. McKendrick*, 481 F.2d 152 (2d Cir. 1973). *Cf. Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975) (reversing a denial of habeas corpus relief, *inter alia*, on the basis of the following portion of a district attorney's closing argument: " 'Because maybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know; maybe it will be somebody that I know. And maybe the next time he'll use the knife . . . .' ")

C. The state improperly placed the prosecutors' personal credibility in issue

Both prosecutors also engaged in blatantly improper argument by placing in issue their own credibility and opinions and those of their office. *E.g., Hall v. United States*, 419 F.2d 582 (5th Cir. 1969); *Dunn v. United States*, 307 F.2d 883 (5th Cir. 1962); *Greenberg v. United States*, 280 F.2d 472 (1st Cir. 1960).

Mr. White, who spoke first, was responsible for the most flagrant example of this. He concluded his argument to the jury with the following words:

> "I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life." (A. 120)

This statement was, of course, grossly improper. *Cf. Kelly v. Stone, supra*, where the court characterized as "a highly improper expression of personal opinion" the

following, less explicit comment: " 'If you can't find the defendant guilty on the facts that I have presented to you, I feel like I just might as well, you know, close up shop and go home. . . .' " 514 F.2d at 19. But it was by no means the only instance in which the prosecutors added the weight of their own opinions to the trial testimony.

Mr. McDaniel, for example, repeatedly offered the jury his opinion that petitioner was not a man worthy of belief. Since petitioner's defense consisted largely of his own alibi testimony, the prejudice from such remarks is manifest. McDaniel's statements included the following:

> a. Petitioner testified that he had asked for a lie detector test. In discussing that testimony, McDaniel said: "I don't believe anything he says . . ." (A. 131).
>
> b. Petitioner testified that his alibi was the truth. McDaniel attacked this testimony in the following way: "Well, let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out" (A. 124).
>
> c. Petitioner testified that he remembered the precise times of several events that occured during the day of the murder. These statements were a crucial part of his testimony for, if true, they established that he could not have been in the Turman furniture store at the time of the crime. McDaniel's response: "I couldn't even tell you right now what day I put a witness on the stand this week" (A. 130).
>
> d. Petitioner testified that he stopped at a service station after his automobile accident, seeking assistance—testimony that was confirmed by one of the state's own witnesses. Yet McDaniel recounted Darden's testimony and said: "That's what he says. I don't know that he stopped at any. . . . I guarantee you he was not going back to the scene of the accident until he had gotten home" (A. 135).
>
> e. In addition to telling the jury that he thought petitioner a liar, McDaniel also suggested in a thinly veiled way that he knew of other instances where petitioner had shot people: "Darden doesn't like people who move after he shoots them in the mouth" (A. 127).

The impropriety of each one of these statements of personal opinion by the prosecution is beyond question. Taken together, they contributed in substantial measure toward the denial of a fair trial to the defendant.

The several reasons why expressions of personal opinion by counsel have long been outlawed were well stated by the First Circuit in *Greenberg v. United States, supra,* 280 F.2d at 475 (1960). Judge Aldrich wrote:

> "To permit counsel to express his personal belief in the testimony [of a witness] (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing."

D. The state's summation also included other forms of improper argument

McDaniel's summation also contained numerous other instances of improper argument, which, perhaps taken alone and surely when taken together with those

already discussed, nullified petitioner's right to a fair trial. Some of McDaniel's comments, for example, tended to interfere with petitioner's right to the effective assistance of counsel by commenting in a deprecatory way on his exercise of that right. Indeed, McDaniel began his argument by telling the jury in effect that it should pay no attention to the argument of defense counsel that would follow because all defense lawyers always made the same arguments:

> "Now [defense counsel] and I am positive, and I assure you and I guarantee you that [defense counsel] will try the Polk County Sheriff's Office; he will try the Polk County Sheriff's Office; and he will try me. And he will try Mr. White. I guarantee that, because he has notes I gave him many years ago." (A. 121)

The inarticulate premises were, of course, that all arguments by defense counsel are fabrications and that all defendants are guilty.

McDaniel committed similar misconduct when he discussed petitioner's statement that he would take a lie detector test if his attorney were present. McDaniel said:

> "Well, only an incompetent lawyer would allow Darden to take a lie detector test. And that prisoner, with those convictions on his record, knows that" (A. 131).

Finally, throughout his argument McDaniel repeatedly referred to aspects of petitioner's conduct while on weekend furlough from prison that were entirely unrelated to the offenses with which he was charged. Suggestive references to petitioner's relationship with his girlfriend and other comments of like character (A. 122, 128, 129) could have had no other effect than to imply to the jury that petitioner was a

"bad man" and therefore probably committed the offenses charged in the indictment. *Cf. Manning v. Jarnigan*, 501 F.2d 408, 412 (6th Cir. 1974).

E. Under the standards enunciated in *Donnelly v. DeChristoforo*, the prosecution's summation deprived petitioner of a fair trial

In *Donnelly v. DeChristoforo, supra,* the Court set forth criteria to be utilized in measuring whether misconduct by a prosecutor during summation has worked a deprivation of the right to a fair trial. The factors identified in *DeChristoforo* include: 1) the length and frequency of the prejudicial statements in proportion to the total length of the summation and the likely impact of these statements on the jury; 2) whether the statements were intentional and, if so, whether they were provoked by defense counsel; and 3) whether the trial judge promptly took appropriate corrective steps and, if so, the likely effectiveness of those steps. Under these criteria, it is clear that the prosecutor's closing argument in the present case deprived Darden of due process of law.

In *DeChristoforo*, the Court found that the challenged remarks of the prosecutor, though improper, had not deprived DeChristoforo of a fair trial. The statements at issue were cnly "a few brief sentences in the prosecutor's long . . . closing argument which might or might not suggest to a jury that the respondent had unsuccessfully sought to bargain for a lesser charge." 416 U.S. at 647.

In the case at bar, by contrast, the record shows clearly that the prosecutor's improper remarks were neither isolated nor ambiguous. McDaniel's inflammatory and irrelevant comments took up more of his

closing argument than did his consideration of the evidence. Unlike the prosecutor in *DeChristoforo*, who merely suggested, inadvertently or ambiguously, that respondent had admitted his guilt, McDaniel attempted, repeatedly and at length, to poison the atmosphere of the trial and deprive petitioner of his right to an objective, impartial jury. Nor could the jurors have misapprehended the prosecutor's meaning. The defendant, he told them unequivocally over and over again, was wholly unworthy of belief and deserved to be treated as a wild animal;[4] only through a conviction for first degree murder and recommendation of a death sentence by the jury might the public be secure against him.

In *DeChristoforo*, this Court concluded that the prosecutor's misconduct was not intentional principally because the challenged remark was isolated and ambiguous and could easily have slipped out in the heat of argument. "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." 416 U.S. at 647.

McDaniel's remarks, in contrast, could only have been intentional, his lip service to the canons of ethics notwithstanding (A. 122). He repeated the improper themes over and over again. There can likewise be no doubt that the jury understood the prosecutor's meaning – his remarks could only have been taken as encouragement to reach a decision on petitioner's guilt

[4] *E.g.*, "This person [petitioner] was an animal, this animal was on the public for one reason. . . . He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash" (A. 121).

based on conduct of the Division of Corrections and in an atmosphere charged with hatred.

Moreover, the record is clear that the defense attorneys did nothing that might have "provoked" the prosecutors. Indeed, we submit that nothing they could have said would ever excuse conduct like that of the prosecution during summation in the case at bar.

In *DeChristoforo*, the prosecutor's remark, "ambiguous" and "but one moment in an extended trial," "was followed by specific disapproving instructions." 416 U.S. at 645. By contrast, the trial court in the present case, instead of admonishing the jury that the prosecutor's remarks were improper and directing the jury to ignore them, overruled petitioner's objection without comment (A. 136). Rather than striving at least to mitigate the impact of the prosecutor's misconduct, the court allowed the jury to believe McDaniel's argument was proper and worthy of consideration.

We submit, however, that even if the court had sustained petitioner's objection, reprimanded the prosecutor and instructed the jury to disregard the improper portions of his argument – or even if the court's general instructions on the role of argument were read as addressing this question (A. 103-04; R. 863-64) – petitioner would still be entitled to a reversal of his conviction, for the inflammatory nature of McDaniel's summation was "too clearly prejudicial for . . . a curative instruction to mitigate [its] . . . effect" *Donnelly v. DeChristoforo, supra*, 416 U.S. at 644; *cf. Kelly v. Stone, supra*, 514 F.2d at 19.

In sum, the very considerations that led the Court to conclude that the prosecution's conduct in the *DeChristoforo* case did not work a denial of due process of law to the respondent there, all compel an opposite conclusion in the case at hand. As the Court stated in *Berger v. United States*, 295 U.S. 78, 89

(1935): "[W]e have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury . . . ."[5]

F. The prosecution's misconduct was not harmless constitutional error

Because the state's response to the discussion of the summation question in our petition for certiorari relied principally upon a claim of harmless constitutional error, we add a few thoughts to make plain the unavailability of such a refuge to the prosecution.

"The question," the Court said in *Chapman v. California*, 386 U.S. 18 (1967),

[5] The Standards Relating to the Prosecution Function adopted not long ago by the American Bar Association Project on Standards for Criminal Justice serve further to highlight just how far the prosecution's conduct here departed from that to be expected of responsible state's attorneys. Part V of the Standards sets forth specific guides as to the forms of argument that a prosecutor is prohibited from utilizing in summation. The pertinent rules are these:

> "(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> "(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
>
> "(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict."

Beyond question, the closing argument to the jury here infringed each of these rules not once but many times over.

> " 'is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'
>
> * * * * *
>
> ". . . the burden [is] on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.
>
> * * * * *
>
> ". . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 23-24 (footnote omitted), quoting in part from *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

Applying these standards in *Chapman* itself, the Court reversed the convictions at issue, despite what it characterized as a "reasonably strong 'circumstantial web of evidence,' " reasoning that the case was one "in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts." 386 U.S. at 25-26.

Evaluated in these terms, the prosecutorial misconduct in the present case assuredly cannot be deemed to have been harmless. As we pointed out in our statement of the case, the evidence against Darden was anything but overwhelming. The nub of the prosecution's proof was the identification testimony of Mrs. Turman and Mr. Arnold – identifications which were sharply challenged at trial and which, as we discuss in the next two points of our argument, were infected by needlessly suggestive prosecutorial conduct.[6] Apart

[6] Multiple identifications, of course, provide no assurance of accuracy when all identifying witnesses "have been subjected to a suggestive identification procedure." P. Wall, *Eye-Witness Identification In Criminal Cases* 11 (1975).

from these disputed identifications, the only evidence of consequence proffered by the prosecution was that showing that a pistol of the caliber used in the crime and from which four bullets had been discharged had been found adjacent to the highway not far from the location of Darden's automobile accident. However, notwithstanding an FBI study, the pistol was not shown to have been fired at a time contemporaneous with that of the crime nor was ballistic or other evidence offered directly connecting the gun to the crime.

In these circumstances we submit that any suggestion that the evidence of petitioner's guilt was overwhelming or that McDaniel's tactics were "harmless beyond a reasonable doubt" cannot be taken seriously. Indeed, the very fact that the prosecution chose to sum up in so blatantly improper and inflammatory a fashion is itself indicative of the doubtfulness of the case for conviction, for surely no prosecutor in his senses would risk a reversal by indulging in such tactics if he believed the state's proof was overwhelming.

Moreover, even the majority opinion in the Supreme Court of Florida was candid enough to acknowledge that McDaniel's conduct was improper and to recognize that the "language used by the prosecutor would have possibly been reversible error if it had been used regarding a less heinous set of crimes." *Darden v. State*, 329 So.2d 287, 290 (Fla. 1976). Turning logic on its head, however, the court concluded that, in light of the nature of the crimes, McDaniels' repeated improprieties were "fair comment" on the evidence. *Ibid.*

Even if the prosecutor's inflammatory discourse had, in fact, been germane to the evidence, the Florida court would have been wrong in implicitly suggesting that greater latitude for prosecutorial misconduct may be countenanced upon a trial for first-degree murder than when the crime is of lesser viciousness or severity. The

demands of due process do not vary inversely with the seriousness of the charge; the Constitution requires that when life is at stake, the concern that a defendant receive a fair trial be at its greatest. *Reid v. Covert*, 354 U.S. 1, 65 (1957) (Harlan, J. concurring); *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

Some forty years ago Justice Sutherland wrote for the Court that, while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). To permit the state to find refuge in a plea of harmless constitutional error in the face of the closing arguments at petitioner's trial would invite prosecutors everywhere to strike "foul blows" in summation with confidence that their misconduct would go unchecked by constitutional remedy. The Court should decline to afford such license to state's attorneys by reversing petitioner's conviction.

II.

THE TRIAL COURT'S FAILURE TO EXCLUDE EVIDENCE OF MRS. TURMAN'S WANTONLY AND GRATUITOUSLY SUGGESTIVE PRETRIAL IDENTIFICATION OF PETITIONER DEPRIVED HIM OF DUE PROCESS OF LAW

The trial court permitted Mrs. Turman, the wife of the murder victim, to testify that she had identified petitioner at a preliminary hearing conducted some five days after the crime. Mrs. Turman's testimony was central to the prosecution's case since, as we have already said, the identification of petitioner was the only evidence directly connecting him to the crime.

We show below that the circumstances under which Mrs. Turman's pretrial identification occurred were

"unnecessarily suggestive and conducive to irreparable mistaken identification," *Stovall v. Denno*, 388 U.S. 293, 302 (1967), and that the prosecution's use at trial of testimony as to the earlier identification therefore requires reversal of petitioner's conviction. *Compare Foster v. California*, 394 U.S. 440 (1969); *Brathwaite v. Manson*, 527 F.2d 363 (2d Cir.), *cert. granted*, 96 Sup. Ct. 1737 (1976) (argued November 29, 1976); and *Palmer v. Peyton*, 359 F.2d 199 (4th Cir. 1966), *with United States ex rel. Kirby v. Sturges*, 510 F.2d 397, 403 (7th Cir.), *cert. denied*, 421 U.S. 1016 (1975).

The Court last addressed the question of the proper test to be applied in determining whether to exclude evidence at trial of an impermissibly and unnecessarily suggestive pretrial identification in *Neil v. Biggers*, 409 U.S. 188 (1972). In that case both the pretrial confrontation and the trial had taken place prior to the Court's decision in *Stovall v. Denno*, *supra*, which held that the Fourteenth Amendment right to a fair trial may require the exclusion of identification evidence obtained as a result of suggestive pretrial confrontations.

In *Biggers* the Court acknowledged the dangers inherent in suggestive confrontations[7] but refused to impose a strict rule excluding evidence of unnecessarily suggestive pretrial identifications without regard to their reliability. The Court explained that the principal purpose of a *per se* rule of exclusion would be deterrence of improper police conduct, 409 U.S. at 199, and concluded that such a rule would not be warranted in the circumstances then before it since, until *Stovall*, police conduct could not have been influenced by the rules there articulated. Hence, the Court held that the standard to be applied, at least for

[7] *See also, e.g., United States v. Wade*, 388 U.S. 218 (1967).

pre-*Stovall* identifications, was the less rigorous one enunciated in *Simmons v. United States*, 390 U.S. 377, 384 (1968): whether, under the totality of the circumstances, the particular identification procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Neil v. Biggers, supra*, 409 U.S. at 198.

Biggers left open the question whether the Constitution requires more stringent prophylactic rules in cases, such as the present one, in which both the identification and the trial post-date *Stovall*. See Grano, *Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?* 72 Mich. L. Rev. 717, 777 (1974).

A. The preliminary hearing was unnecessarily and impermissibly suggestive

Mr. Turman was killed on September 8, 1973. Five days later, on September 13, 1973, a brief preliminary hearing was held; Mrs. Turman was the only witness. Petitioner, who was seated with his attorney at the defense table, was apparently the only black person in the courtroom, and was certainly the only black person at the defense table (A. 51-53).[8] After a few questions by the prosecutor, the Court interrupted and the following colloquy took place:

"THE COURT: Ask her to identify.
MR. MARS [the prosecutor]: Yes, sir.
Q: Can you see this man sitting here?
MR. HILL [the public defender]: Your Honor,

[8] At trial the Court denied a motion to suppress, accepting for purposes of deciding the motion that petitioner had been the only black in the room at the time of the identification (A. 35-36).

I am going to object to that type of identification.
THE COURT: I am not. Sit down.
MR. HILL: Judge –
THE COURT: Not under these circumstances, Mr. Hill.
MR. HILL: Judge, even as a defense attorney, that shows no respect in court, much less for the Court, and I ––
THE COURT: I appreciate ––
MR. HILL: And the objection, I want on the record.
THE COURT: I appreciate that. It's on the record. This woman has had a traumatic experience and she ––
MR. HILL: Judge, I appreciate that. I still have an obligation to my client.
THE COURT: I appreciate that. Now, if you want to be held in contempt, you pardon me. Alright, go ahead.
Q. Is this the man that shot your husband?
A. Yes, sir." (A. 8-9)

Plainly, the procedures followed at the preliminary hearing were impermissibily suggestive within the meaning of *Stovall.* As the Court there said,

> "[t]he practice of showing suspects singly to persons for the purpose of identification and not as part of a lineup, has been widely condemned." 388 U.S. at 302 (footnote omitted).

Cf. Foster v. California, supra, 394 U.S. at 443. Indeed, the exhibition of a single suspect to a witness has been characterized as "the most suggestive and, therefore, the most objectionable method of pretrial identification," *United States v. Dailey,* 524 F.2d 911, 914 (8th Cir. 1975), and as "the most grossly suggestive identification procedure now or ever used by the police." P. Wall, *Eye-Witness Identification in Criminal Cases* 28 (1975).

The inherent defect in a procedure like that followed at petitioner's preliminary hearing is, of course, that the state in effect has said to the witness: "We have captured the criminal. Here he is. Don't you agree?" *Cf. Foster v. California, supra,* 394 U.S. at 443 ("In effect, the police repeatedly said to the witness, '*This* is the man.' ") (emphasis in original); *United States ex rel. Kirby v. Sturges, supra,* 510 F.2d at 403.

Mrs. Turman's testimony at trial and at the preliminary hearing shows that the prosecution had made her identification of petitioner "all but inevitable," *Foster v. California, supra,* 394 U.S. at 443, regardless of whether he had, in fact, shot her husband. In response to cross-examination at trial, Mrs. Turman demonstrated that the prosecution had made perfectly clear to her why she had been invited to the preliminary hearing.

> "Q. Do you remember why you were there?
> A. To identify him." (A. 32)

Clearly, she understood before she arrived at the preliminary hearing – which is, after all, a step in the formal accusatory process – that the police had captured the person they believed was her husband's murderer, and that she was expected to confirm their choice by identifying him. *Cf. Sanchell v. Parratt,* 530 F.2d 286, 294 (8th Cir. 1976). See P. Wall, *supra,* at 47.

Mrs. Turman's testimony at the preliminary hearing itself pointed up just how suggestive the procedure actually was.

> "THE COURT: Are you sure about the identification of this man you see in front of you as being the same man that you've spoken about?

A. Even with his back to me while I sat back there, I reached over and touched my sister's hand and said, 'That's him.' " (A. 11)

Everyday experience tells us that even those we have known long and intimately cannot be recognized with any confidence when their backs are to us. Surely Mrs. Turman could not have had greater certainty about the identity of a total stranger whom she had seen for only a brief time under the most trying of circumstances. Rather, her selection as the criminal of a man she saw from the rear as she sat in the courtroom was plainly the product of her knowledge that the suspect already arrested by the police would be present at the hearing and of the mere presence in the courtroom of a lone black man. The setting all but assured that any black man who had the misfortune to be seated at the defense table would be chosen by Mrs. Turman as the assailant.

The suggestiveness of the procedure utilized by the prosecution was enhanced still further, first by the court's pointed introduction to the procedure ("Ask her to identify"), which again demonstrated to Mrs. Turman if, somehow, she did not already know, that she was expected to identify petitioner, and then by the prosecutor's leading questions ("Can you see this man sitting here?"; "Is this the man that shot your husband?"). Any doubts about the cumulative effect of the suggestive elements of this confrontation are resolved by Mrs. Turman's testimony, again on cross-examination at trial, that the prosecutor's questions directed her attention to petitioner:

"Q: But he did in some way through the record of what was asked in the answers that were given indicate this man here?
A: I would say yes.

* * *

Q: Mrs. Turman, just a couple of questions. At that preliminary hearing that Mr. McDaniel and I both have been talking about, in your mind was there any question who Mr. Mars was referring to when he asked the question, 'Is that the man that killed your husband?'
A: No, there was no doubt in my mind.
Q: As to who he was referring to?
A: Right." (A. 54, 64).

It is clear, also, that the prosecution's use at trial of testimony of Mrs. Turman's earlier suggestive identification should have been wholly unnecessary. Petitioner was taken into custody within a few hours of the crime, and there was surely ample opportunity between his arrest and the preliminary hearing five days later to conduct a line-up consistent with petitioner's constitutional rights. Significantly, at no point in these proceedings has the state come forward with even a suggestion of a reason for its failure to do so. *Cf. Smith v. Coiner,* 473 F.2d 877, 881 (4th Cir.), *cert. denied sub nom. Wallace v. Smith,* 414 U.S. 1115 (1973).

B. Mrs. Turman's testimony concerning her pretrial identification of petitioner should have been barred under a strict rule of exclusion[9]

This Court and others have repeatedly observed that there is no constitutional right to a non-suggestive identification proceeding; a due process violation takes place, if at all, only when evidence of an unnecessarily suggestive confrontation is introduced at trial. *E.g., Stovall v. Denno, supra.* Nevertheless, we think that the

[9] We are, of course, familiar with the arguments on this subject advanced in the briefs submitted to this Court in *Brathwaite v. Manson, supra.*

Constitution compels a strict rule of exclusion to protect the fundamental constitutional right to a fair trial by deterring improper police identification procedures, *cf. United States v. Wade, supra,* 388 U.S. at 235; *Gilbert v. California,* 388 U.S. 263, 272-74 (1967), and by minimizing the risk of convictions based on evidence the reliability of which is in doubt and inherently unascertainable.

We take as our starting point the Court's opinion in *Michigan v. Tucker,* 417 U.S. 433 (1974). Tucker had been interrogated by the police without having been informed that, if he could not afford to retain an attorney, counsel would be appointed for him. Even though the interrogation took place prior to *Miranda v. Arizona,* 384 U.S. 436 (1966), Tucker's own statement was, of course, excluded. See *Johnson v. New Jersey,* 384 U.S. 719 (1966). During the interrogation, however, Tucker had voluntarily supplied the police with the name of a witness, Henderson, who later gave a statement tending to inculpate Tucker. The issue in *Tucker* was whether the trial court should also have excluded Henderson's statement.

The Court noted that the "Miranda warnings" are judicially-imposed prophylactic rules designed to protect the underlying Fifth Amendment right against compelled self-incrimination; they are not themselves mandated by the Constitution. *Michigan v. Tucker, supra,* 417 U.S. at 444-45; *Miranda v. Arizona, supra,* 384 U.S. at 467. Nevertheless, in an opinion by Justice Rehnquist, the Court concluded that it would be appropriate to exclude evidence obtained in violation of *Miranda*'s procedural protections, even if the Fifth Amendment itself had not been violated, if the benefits of the exclusion outweighed its costs. 417 U.S. at 446, 450-51. *See also, Brown v. Illinois,* 422 U.S. 590, 609 (1975); *United States v. Peltier,* 422 U.S. 531 (1975);

United States v. Calandra, 414 U.S. 338, 347-52 (1974); *Weeks v. United States* 232 U.S. 383 (1914).[10]

We show below that application of the cost-benefit analysis of *Tucker* to the use at trial of evidence of wantonly and gratuitously suggestive pretrial identifications requires the exclusion of such evidence without regard to its probative value. First, the reliability of such evidence is always uncertain and is inherently not susceptible to verification. Second, a *per se* rule excluding such evidence will conserve judicial resources by freeing courts from protracted, will-o-the-wisp inquiries into the reliability of identifications made in needlessly suggestive circumstances. Finally, such a rule will deter improper police procedures and thereby minimize the risk of the admission of evidence of questionable reliability. These benefits, when weighed against the trival costs of a *per se* rule in the administration of justice, require the rule's adoption.

1. The reliability of evidence of wantonly suggestive identifications is inherently unascertainable

This Court has repeatedly recognized that the suggestiveness of an identification procedure is at best difficult to determine and that its impact on a witness is often impossible to assess. *E.g., Foster v. California, supra; Stovall v. Denno, supra.* The use at trial of

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[10]In *Tucker* the balancing of interests militated against the extension of *Miranda*'s exclusionary rule to Henderson's statement. First, the probability was high that Henderson's statement was reliable, since it was not coerced. 417 U.S. at 448-49. Second, deterrence, which assumes negligent or willful police misconduct, *id.* at 447, would not have been furthered by a rule of exclusion because the police had acted in accordance with the then prevailing rules of *Escobedo v. Illinios,* 378 U.S. 478 (1964). *Cf. Neil v. Biggers, supra,* 409 U.S. at 199.

evidence of an identification proceeding as wantonly suggestive as the preliminary hearing in the case at bar is thus improper in large measure because such a proceeding cannot test the witness' ability accurately to identify the criminal.

Neither court nor jury can be expected to divine with any reasonable degree of confidence whether such an identification is the product of the suggestion inherent in the proceeding or of the witness' initial observation of the criminal. An identification made at such a confrontation is, thus, not in any meaningful sense "reliable"[11]; for that reason its use as part of the prosecution's case-in-chief deprives the defendant of due process of law. *Neil v. Biggers, supra,* 409 U.S. at 198; *see also United States ex rel. Kirby v. Sturges, supra. Cf. United States v. Wade, supra.* The Court in *Stovall* recognized this and therefore asked not whether the identification was reliable or correct but whether "the *confrontation* conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law." 388 U.S. at 301-02 (emphasis added).[12]

In *Foster v. California, supra,* the only case other than *Biggers* involving testimony of an unnecessarily suggestive pretrial identification to have reached the Supreme Court, the Court again recognized the impossibility of assessing the impact of suggestion and applied the *Stovall* standard. It held that an identification made under such circumstances "so determined the reliability of the eyewitness identification as to violate due process." 394 U.S. at 443.

In *Foster* a witness identified the defendant only after three separate, suggestive identification procedures. The Court reversed Foster's conviction without discussion of either the witness' opportunity to observe the criminal or of the "reliability" of the witness' identification, because the procedures were so suggestive that the likelihood of misidentification was high. *Neil v. Biggers, supra,* 409 U.S. at 198. The Court did not consider the correctness of the identification.

It is important to contrast the problem presented in the case at bar – and in *Stovall* and *Foster* – with the problem raised by such cases as *Coleman v. Alabama,* 399 U.S. 1 (1970) and *Simmons v. United States, supra. Stovall* and *Foster* ask when a witness may properly testify to an earlier wantonly suggestive identification. *Coleman* and *Simmons* assume a suggestive confrontation about which a witness may not

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[11]See Grano, *Kirby, Biggers, and Ash, supra,* 72 Mich. L. Rev. at 782: "Unlike lineups, showups fail to provide independent verification of the witness's ability to identify the offender. A yes-no procedure is much more conducive to unchecked guessing than a procedure which requires the witness to choose from several potential defendants" (footnote omitted). *Cf. United States v. Wade, supra,* where the Court said, while explaining why cross-examination was insufficient protection against unfair lineups,

> "the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself." 388 U.S. at 235.

[12]The sole authority relied on by the *Stovall* Court was *Palmer v. Peyton,* 359 F.2d 199 (4th Cir. 1966), which "clearly regarded the purpose of the due process rule as the exclusion of evidence obtained by outrageously suggestive and, therefore, potentially prejudicial means." Pulaski, *Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection,* 26 Stan. L. Rev. 1097, 1109 (1974).

testify, and ask whether the witness may nevertheless testify about a subsequent identification. Such testimony is admissible if the later identification stems from a source independent of the concededly suggestive earlier confrontation. *United States v. Wade, supra,* 388 U.S. at 241-243.[13] See Note, 73 Col. L. Rev. 1169, 1172-73, 1181 n. 100 (1973); Pulaski, *supra,* 26 Stan. L. Rev. at 1113. The *Simmons* standard thus does not contemplate the validation of a suggestive identification.

2. The attempt to evaluate the reliability of suggestive identifications has resulted in confusion

As Justice Stevens, writing for the Court of Appeals for the Seventh Circuit, recognized in *United States ex rel. Kirby v. Sturges, supra,* the conclusion that the reliability of suggestive identifications cannot be measured assumes that judges cannot distinguish between "identification evidence which is so unfair as to be constitutionally inadmissible, and that which state courts may permit juries to assess. . . ." 510 F.2d at 407.

We have already shown that, as a matter of principle, this must be so. The following cases demonstrate that attempts to make that distinction, under a "totality of the circumstances" test, have resulted in widely divergent conclusions about the proper application of such a test. See, *e.g., Neil v. Biggers, supra,* 409 U.S. at 200-01; *United States v. Russell,* 532 F.2d 1063 (6th Cir. 1976); *Sanchell v. Paratt,* 530 F.2d 286 (8th Cir.

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[13]Since the Court decided *Stovall* and *Wade* on the same day, the failure to consider the independent basis question, either in *Stovall* or, subsequently, in *Foster* is particularly significant confirmation of this explanation of the difference between the standards adopted in *Stovall* and *Simmons.*

1976); *United States ex rel. Cannon v. Smith,* 527 F.2d 702 (2d Cir. 1975); *United States v. Dailey, supra*; *United States v. Bowie,* 515 F.2d 3 (7th Cir. 1975); *Holland v. Perini,* 512 F.2d 99 (6th Cir.), *cert. denied,* 423 U.S. 934 (1975); *Brathwaite v. Manson, supra; Smith v. Coiner, supra; Dixon v. Hopper,* 407 F. Supp. 58 (M.D. Ga. 1976); *Thomas v. Leeke,* 393 F. Supp. 282 (D. S.C. 1975).

At the very least it is apparent from these and the legion of other, similar cases, that an inordinate amount of judicial energy is consumed attempting to answer a question that is inherently unanswerable, under conditions where the accuracy of any answer reached can never be determined.

3. The exclusion of evidence of suggestive identifications without regard to reliability is consistent with the Court's treatment of coerced confessions

The view that it is appropriate to exclude evidence of unnecessarily suggestive identifications without inquiry into the reliability of each such identification is consistent with the rules established for the exclusion of coerced confessions prior to *Miranda.* Thus, in *Jackson v. Denno,* 378 U.S. 368 (1964), the Court

> "made clear that the truth or falsity of a statement is not the determining factor in the decision whether or not to exclude it. [Citation omitted.] Thus a State which has obtained a coerced or involuntary statement cannot argue for its admissibility on the ground that other evidence demonstrates its truthfulness." *Michigan v. Tucker,* 417 U.S. at 448 n. 23.

Coerced confessions are presumed unreliable. *Jackson v. Denno, supra,* 378 U.S. at 386-87.

The case for excluding evidence of impermissibly suggestive identifications is even stronger. When a court considers a confession, there are usually extrinsic facts to which it can turn. Hence, it is usually possible to decide whether the confession is consistent with other, known facts and is, therefore, "reliable." In the identification context, however, extrinsic facts can tell the court no more than whether the witness had an adequate opportunity to observe the criminal at the time of the commission of the crime. They cannot tell the court whether or to what extent the identification made under suggestive conditions is in fact the product of the suggestion.

4. A *per se* rule excluding evidence of suggestive identifications would deter the police from using suggestive identification procedures and thereby minimize the risk of the introduction of unreliable evidence at trial

Biggers recognized that a principal justification "of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available . . . ." 409 U.S. at 199. *Cf. Gilbert v. California, supra,* 388 U.S. at 273. This goal is of obvious importance, both because it would contribute substantially to the integrity of the judicial system and because it would reduce the risk of convictions based on unreliable evidence. *Mapp v. Ohio,* 367 U.S. 643 (1961). *See also, United States v. Calandra, supra,* 414 U.S. at 347-52.

The facts of this case, as well as the frequency with which identification problems arise in the lower courts, show that the need for deterrence remains great despite this Court's growing line of decisions establishing

standards for the exclusion of improper identification evidence. See Grano, *"Kirby, Biggers and Ash," supra,* 72 Mich. L. Rev. at 723-24.

In the present case, the prosecution's use of Mrs. Turman's pretrial identification in its case-in-chief was clearly willful and unnecessary. Both the identification and trial took place after *Stovall,* so the police should certainly have been alerted to the possible consequences of using unreliable identification procedures. The prosecution could easily have conducted a lineup prior to the preliminary hearing or, if it had confidence in Mrs. Turman's observation of the criminal at the time of the crime, afterwards. It did neither. Nor was the prosecution under any obligation to use a pretrial identification in its direct case at all. The use of Mrs. Turman's preliminary hearing identification is thus a prime example of the kind of conduct that can and should be deterred.

Only the strict rule of exclusion proposed here is likely to have the necessary deterrent impact. Since it is relatively simple to structure a fair lineup or photo display, law enforcement officials will not be unduly burdened and, since the impact of the rule will be confined solely to gratuitously improper police procedures, problems similar to those encountered in the application of the Fourth Amendment exclusionary rule, which often requires the exclusion of evidence seized as a result of "good faith" Fourth Amendment violations, will be avoided. It is in precisely this sort of context that

> "the deterrent value of the exclusionary rule is most likely to be effective, and the corresponding mandate to preserve judicial integrity . . . most clearly demands that the fruit of official misconduct be denied." *Brown v. Illinois, supra,* 422 U.S. at 611 (Powell, J., concurring).

The less rigorous "totality of the circumstances" rule is likely to have little deterrent impact. If a prosecutor is permitted to establish the "reliability" of an unnecessarily suggestive identification merely by proof of an adequate opportunity to observe the criminal at the time of the crime, the police will have little incentive to employ the most reliable available identification procedure; they will know that virtually no identification need be excluded no matter how suggestive the atmosphere in which it took place. Pulaski, *Neil v. Biggers, supra,* 26 Stan. L. Rev. at 1120.

In addition to deterring improper police procedures and protecting defendants and the public at large from convictions based on evidence of questionable reliability, a strict exclusionary rule would make the courts' reviewing function substantially easier. Trial courts would no longer be required to hold complex hearings to assess the circumstances under which witnesses observed the commission of crimes and to evaluate psychological factors that can properly be interpreted, if at all, only after carefully structured scientific analysis. See Levine and Tapp, *The Psychology of Criminal Identification: The Gap From Wade To Kirby*, 121 U. Pa. L. Rev. 1079 (1973). Both trial and appellate courts will be able to focus their attention on facts less likely to be disputed – principally the identification procedures employed and the justifications for the suggestiveness of those procedures.

5. A strict exclusionary rule would interfere only minimally with effective law enforcement

On the other side of the ledger, there is little cost to law enforcement agencies in the adoption of a strict exclusionary rule. Such a rule would exclude only

evidence obtained in an improper proceeding. The "independent basis" test of *United States v. Wade, supra,* would still permit the prosecution to attempt to establish that the suggestive proceeding had not irremediably tainted a witness' ability to identify. The witness could then attempt an identification at a properly conducted lineup. Only if a witness were subjected to an unnecessarily suggestive identification *and* if he had had an inadequate opportunity to observe the criminal at the time of the crime would the prosecution be unable to make use of any later identification by that witness.

C. Mrs. Turman's testimony concerning her pretrial identification of petitioner should have been excluded as the product of a confrontation so suggestive "as to give rise to a very substantial likelihood of misidentification"

In section (A.) of this point we described the respects in which Mrs. Turman's pretrial confrontation with petitioner was impermissibly and unnecessarily suggestive. We show here that it was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States, supra,* 390 U.S. at 384. In *Neil v. Biggers, supra,* the Court summarized the factors to be examined in making this determination.

> "As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level

> of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." 409 U.S. at 199-200.

See *Simmons v. United States, supra,* 390 U.S. at 382-86.

The first factor identified in *Biggers* was the witness' opportunity to observe. In the case at bar, Mrs. Turman testified that her husband's murderer was in her presence for approximately ten minutes. The more significant question, however, is what she did with the opportunity or, as the Court phrased it in *Biggers,* her "degree of attention."

We know from Mrs. Turman's testimony that once the robber pointed a gun at her she was too frightened to look at him or to know what was happening, and that at one point she even covered her face with her hands and began to pray (A. 46). The record also suggests that Mrs. Turman did not pay close attention before the gun appeared. At trial she did not remember, for example, whether the robber walked around the store in front of her or behind her or, indeed, whether or not she accompanied him for part of his walk (R. 234-35). When she was asked questions about what acts not connected to the crime the robber performed while in the store, she could not remember (A. 42-43).

A third factor – the inaccuracy of Mrs. Turman's prior identification – is closely related to the first two questions. We have already described how Mrs. Turman's initial description of her husband's murderer deviated markedly from petitioner's actual appearance at the time of his automobile accident (*supra,* pp. 8-9). In addition to answering directly the question posed in *Biggers,* this initial description – when contrasted with her identification of petitioner five days later – suggests that, despite the opportunity she

may have had to observe the murderer, Mrs. Turman did not pay close attention to him. Finally, it bears mention that when questioned by a deputy sheriff an hour or two after the crimes, Mrs. Turman herself expressed doubt as to her ability to identify the criminal upon sight (A. 45-46).

In the face of these circumstances, Mrs. Turman's testimony that she was certain of the accuracy of her pretrial identification (A. 37) simply cannot be credited. See P. Wall, *supra,* at 15. This must surely be true in light of Mrs. Turman's comment as to the time when this certainty seized her: before she saw petitioner's face at the preliminary hearing, while he sat with his back to her in the courtroom.

The record demonstrates that the pretrial hearing during which Mrs. Turman identified petitioner was conducted in an atmosphere conducive to irreparable misidentification and that misidentification was, in fact, likely.[14] The record contains none of the indicia of reliability that the Court stressed in *Biggers* where, for example, the witness had established a history of reliability by resisting the opportunity to identify persons other than the defendant in properly conducted lineups. 409 U.S. at 201. Finally, the record here reveals no circumstances justifying failure to adhere to a constitutionally permissible identification procedure.

Accordingly, petitioner's conviction must be reversed.

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[14]Since petitioner's conviction must be reversed if Mrs. Turman's testimony as to her pretrial identification of petitioner was improperly admitted, *Neil v. Biggers, supra,* 409 U.S. at 198 n. 5, we need not separately consider the reliability of Mrs. Turman's courtroom identification. See *Sanchell v. Parratt, supra,* 530 F.2d at 296.

III.

THE TRIAL COURT'S ADMISSION IN EVIDENCE OF PHILLIP ARNOLD'S IN-COURT IDENTIFICATION OF PETITIONER DEPRIVED HIM OF DUE PROCESS OF LAW

The trial court's failure to suppress Phillip Arnold's in-court identification of petitioner also requires reversal.

Arnold, as we have described, while still in the hospital recovering from his bullet wounds, selected a photograph of petitioner from among six shown him by sheriff's deputies. He was not permitted to testify to that pretrial identification at the trial, but was allowed to tell the jury that he recognized petitioner as his assailant (A. 96-97).[15] The evidence is substantial that this in-court identification had its genesis in the impermissibly and needlessly suggestive photo spread rather than in Arnold's recollection of the crime itself.

As we have said, when Arnold was shown the group of six photographs in the hospital, he immediately rejected four of them because "they didn't look anything at all like him [petitioner]" (A. 78). Of the two remaining, he chose the picture of petitioner, so he explained, because the other was "also younger, and wasn't as big" (A. 83). Surely, however, the burden of his task was also substantially mitigated by the presence on petitioner's photo of his name and the date of his arrest, for Arnold testified out of the hearing of the jury that he had, by the time of the photo display,

[15]The trial court suppressed Arnold's testimony concerning the photo display, without explanation, after extensive argument focusing on suggestiveness. (A. 95)

already read newspaper stories about the crime and the arrest that had occurred (A. 76, 78-80, 89-90).[16]

In *Simmons*, this Court explained the dangers of suggestive photographic identifications.

> It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. . . . This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, *or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized.* The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. *Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.*" 390 U.S. at 383-84 (emphasis supplied).

See also P. Wall, *supra*, at 81.

The fears the Court expressed in *Simmons* describe precisely what happened in the case at bar. Arnold had only a brief opportunity – 20 to 25 seconds by his own testimony – to observe his assailant, and for much

[16]The testimony of deputy sheriff Neil is also significant. He testified, first, that Arnold identified the photograph in writing by copying the arrest date (A. 89) and, second, that only one or two photographs other than petitioner's had a name on it (A. 90).

of that time his attention was focused on the prostrate Mr. Turman. Arnold also testified that his mind "went blank" for some period after he saw the gun (A. 69, 102). We have already shown that of the two photographs that petitioner did not immediately eliminate the written markings emphasized one – petitioner's.

These facts all point to the conclusion that Arnold's at-trial identification of petitioner was the product of the pretrial photographic identification and not of an independent recollection of the assailant's appearance during the commission of the crime. Moreover, just as the prosecution need not have had Mrs. Turman identify petitioner in a suggestive context, it also need not have done so with Arnold. At the time of Arnold's pretrial identification of petitioner the police had already settled upon him as Mr. Turman's murderer and were pursuing no other leads. The prosecution could have taken more time, if more time was necessary, to gather photographs of other persons bearing a resemblance to petitioner and could also easily have waited until Arnold was released from the hospital and then conducted a proper line-up.

The prosecution's attempt to carry its burden of demonstrating that Arnold's trial identification of petitioner was independent of and not tainted by the display of photographs he had seen, see *Sanchell v. Parratt, supra,* 530 F.2d at 296, falls far short of the requirements established by this Court. As Arnold's direct examination demonstrates, the prosecutor led him through a series of *pro forma* statements that were no more than a gesture of compliance with the law:

> "Q. All right, Mr. Arnold, I want you to look at this man and tell me whether or not you can identify him from the time you saw him

> when he blasted you in the face? Can you, think back to September 8th, 1973, forget anything else, forget the hospital, forget everything, September 8th and right now?
> A: Yes, sir, that's him.
> Q: Do you have any doubt whatsoever in your mind?
> A: No, sir, none.
> Q: Did the photographs – Are you remembering the photographs?
> A: No, Sir.
> Q: What are you remembering?
> A: The day I was shot.
> Q: Are the photographs helping you in any way?
> A: No, sir.
> Q: Whatsoever to identify him?
> A: No, sir.
> Q: None whatsoever in your mind?
> A: None." (A. 83)

Given the fleeting opportunity that Arnold had to observe his assailant and the lapse of some five months between the date of the crime and that of the trial, more must be demanded of the prosecution than the ritualistic testimony of the witness, in response to leading questions, to establish that the courtroom identification is predicated upon a memory of the original observation of the criminal rather than a recollection of the gratuitously suggestive photo spread. Without a meaningful showing of independent memory,

> "it becomes simply a matter of judicial rhetoric to say that the earlier denial of due process is no longer influential in the witness' ultimate identification. Due process, under these circumstances, and the test of substantial likelihood of irreparable misidentification are more than mere subjective tools of the judge viewing the facts. Such tests

necessarily must lend themselves to objective evaluation and the assurance necessary to overcome the pervasive dangers of misidentification." *Sanchell v. Parratt, supra,* 530 F.2d at 296-97.

In the absence of any meaningful attempt by the prosecution to show that Arnold's at-trial identification of petitioner was independent of the photo identification, the trial court's refusal to prohibit Arnold's in-court identification requires that petitioner's conviction be reversed.

IV.

THE EXCLUSION OF PROSPECTIVE JURORS FROM THE VENIRE BECAUSE OF THEIR EXPRESSED GENERAL OPPOSITION TO CAPITAL PUNISHMENT VIOLATED PETITIONER'S RIGHTS UNDER *WITHERSPOON V. ILLINOIS*

Pursuant to Fla. Stat. Ann. §921.141(3) (1974-1975 supp.), it is the jury's duty in capital cases to recommend, by majority vote, a sentence of either death or life imprisonment; the trial judge is empowered to accept or reject the jury's recommendation. Although advisory, the jury's recommendation remains highly important to a convicted capital defendant, for the Florida Supreme Court has said that:

> "[b]oth the trial judge, before imposing a sentence, and this Court, when reviewing the propriety of the death sentence, consider as a factor the advisory opinion of the sentencing jury. In some instances it could be a critical factor in determining whether or not the death penalty should be imposed."

LeMadline v. State, 303 So.2d 17, 20 (Fla. 1974). *See also Taylor v. State,* 294 So.2d 648 (Fla. 1974).

In the present case, the trial court excluded five prospective jurors for cause on the basis of their expressed convictions concerning the death penalty (A. 17-23). Petitioner submits that at least two of these exclusions were patently erroneous under *Witherspoon v. Illinois, supra,* and that his death sentence must therefore be vacated. *Davis v. Georgia,* 45 U.S.L.W. 3414 (December 6, 1976).

Venireman Varney was excluded after the following colloquy:

> "THE COURT: [D]o you hold such conscientious moral or religious principles in opposition to the death penalty you would be unwilling under any circumstances to recommend the death sentence?
>
> * * *
>
> MR. VARNEY: Yes, sir.
>
> THE COURT: You feel then, sir, that even though and I am not saying it will it would [sic] be purely speculative, in the event that the evidence should be such that under the law that should be the legal recommendation you would be unwilling to return such a recommendation because of your conscientious beliefs?
>
> MR. VARNEY: I believe I would.
>
> THE COURT: All right, sir. You will be excused." (A. 18).

Venireman Murphy was excluded on the basis of an even more perfunctory exchange:

> "THE COURT: Do you have any moral or religious, conscientious morals or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?

MR. MURPHY: Yes, I have.

THE COURT: All right, sir, you will be excused then." (A. 22-23)

Witherspoon prohibits the exclusion of veniremen for cause on account of conscientious or religious scruples against the death penalty[17] except under narrow and carefully defined circumstances. Such exclusions are constitutionally permissible only if veniremen make

> "unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." *Witherspoon v. Illinois, supra,* 391 U.S. at 522-23 n. 21 (emphasis in original).

See also, Maxwell v. Bishop, 398 U.S. 262, 266 (1970); *Boulden v. Holman,* 394 U.S. 478, 482 (1969); *Mathis v. New Jersey,* and companion cases, 403 U.S. 946-48 (1971); *Marion v. Beto,* 434 F.2d 29, 32 (5th Cir. 1970).

Mr. Varney's responses to the court's questions concerning the extent and effect of his views on capital punishment fell far short of the *Witherspoon* requirements. He said only that "I believe I would" be "unwilling" to return a recommendation that the death penalty be inflicted. This response hardly demonstrated

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[17]"[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois, supra,* 391 U.S. at 522 (footnote omitted).

"unambiguously," 391 U.S. at 516 n.9, or "unmistakably," 391 U.S. at 522 n.21, that Mr. Varney would "automatically" have voted against the imposition of the death penalty; it did not even begin to suggest that his views on capital punishment would have prevented him from making an impartial decision as to petitioner's guilt. He expressed only a tentative belief that he would be unwilling to return a death sentence, a position that is far less certain than *Witherspoon* requires for exclusion.

Mr. Murphy's response to the court's questioning was equally uninformative. His response established no more than that a vote to recommend the death penalty would violate certain abstract principles. Without explaining its reasoning, the trial court inferred from this that, regardless of what the evidence showed, Mr. Murphy would inevitably and automatically vote to prevent imposition of the death penalty.

The state apparently concedes that the colloquy between the trial court and Mr. Murphy was insufficient to comply with the standards set forth in *Witherspoon,* and argues instead that Mr. Murphy's exclusion was proper because "his answer was given in response to not only [the one question he was asked] but all others similar to it" that were put to other prospective jurors (Response to petition for certiorari, p. 16). We submit, however, that this Court has apparently already rejected this argument. *Alexander v. Henderson,* 409 U.S. 1032, *rev'g* 459 F.2d 1391 (5th Cir. 1972); *Harris v. Texas,* 403 U.S. 947 (1971) (*per curiam*), *rev'g* 457 S.W.2d 903 (Tex. Cr. App. 1970); *Adams v. Washington,* 403 U.S. 947 (1971) (*per curiam*), *rev'g* 458 P.2d 558 (Wash. 1969); *Segura v. Patterson,* 403 U.S. 946 (1971), *rev'g* 402 F.2d 249 (10th Cir. 1969). *See also, Townsend v. Twomey,* 452 F.2d 350 (7th Cir.), *cert. denied,* 409 U.S. 854 (1972); *Hackathorn v. Decker,* 438 F.2d 1363 (5th Cir. 1971).

Moreover, in light of *Witherspoon*'s requirement that the demonstration of the witness' opposition to capital punishment be "unambiguous" and "unmistakable," 391 U.S. at 516 n. 9, 522 n. 21, the state's position cannot prevail. Unless each juror is examined individually as to his or her own views, it is impossible to know with sufficient certainty what those views are.

Seemingly, the court did not conclude that either Mr. Varney or Mr. Murphy would be unable to sit impartially on the question of guilt or innocence. Neither venireman expressed any judgment whatever concerning the impact of his attitude toward capital punishment on his consideration of the evidence of petitioner's guilt; indeed, the court failed to inquire of either of them on this subject. Their silence was especially important, since the court did not explain to either of them their responsibilities as jurors to obey the court's instructions on the law or the meaning of the relevant concept of "impartiality."

The responses of these veniremen are indistinguishable in substance from similar expressions of sentiment by jurors whose exclusion for cause this Court has heretofore found erroneous. See *Witherspoon v. Illinois, supra,* 391 U.S. at 515-16 n. 9. For example, in *Maxwell v. Bishop, supra,* 398 U.S. at 265 (emphasis omitted), the following colloquy took place:

> "Q. Mr. Adams, do you have any feeling concerning capital punishment that would prevent you or make you have any feelings about returning a death sentence if you felt beyond a reasonable doubt that the defendant was guilty and that his crime was so bad as to merit the death sentence?
>
> A. No, I don't believe in capital punishment."

Supra, 394 U.S. at 483-84. The law is clear. Although "a mere reluctance . . . or an abstract belief against capital

punishment is not sufficient grounds for challenging a juror for cause," *Smith v. Whisman,* 431 F.2d 1051, 1052 (5th Cir. 1970), both Mr. Varney and Mr. Murphy were excused upon nothing more.

The trial court's questioning was, indeed, calculated to confuse the prospective jurors as to their duty under the new Florida statute. Although they were instructed that they would have the dual role of considering guilt and sentence separately, they were not asked whether their scruples would interfere with the determination of petitioner's guilt under a procedure in which a guilty verdict does not necessarily entail the death sentence. They were not advised during *voir dire* of the wide range of mitigating circumstances that jurors would be entitled to recognize in making a recommendation against death (A. 15-17). See Fla. Stat. Ann. §921.141(7) (1974-1975 supp.). Had they been properly instructed, the court might well have found that their scruples did not disqualify them from sitting on the jury.

Moreover, we submit that a disqualifying opposition to capital punishment cannot be made "unmistakably clear," as required by *Witherspoon v. Illinois, supra,* 391 U.S. at 522 n. 21, in the absence of an instruction by the trial court that it is the civic duty of each venireman to sit as a juror and to follow the law of the state if he or she can. As the court declared in *Boulden v. Holman, supra,* 394 U.S. at 483-84:

> "[I]t is entirely possible that a person who has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law – to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case."

A venireman should therefore be instructed, at the very least, that the law requires him to "subordinate his personal views to what he perceive[s] to be his duty to abide by his oath as a juror and to obey the law of the State." *Witherspoon v. Illinois, supra,* 391 U.S. at 514-15 n. 7. Without such an instruction the statements of Mr. Varney and Mr. Murphy fall far short of establishing that they were either unwilling or unable to subordinate their feelings to the law of Florida, which the trial court would charge them to obey.

The state, in its response to our petition for certiorari, argued that *Witherspoon* was inapplicable because under Florida law the jury's role in sentencing is advisory only. In addition to being inconsistent with *Witherspoon,*[18] that argument proves too much. If the jury has no significant responsibility in sentencing, then the state has no right to exclude prospective jurors because of their opposition to the death penalty without showing that the veniremen excluded would be unable to sit objectively on the question of guilt or innocence. The state apparently admits that no such showing was made in the case at bar (Response to petition, p. 17).

If the Court does not reverse petitioner's conviction upon any of the grounds set forth in the earlier points in our argument, it should vacate petitioner's death sentence because of the trial court's failure to adhere to the requirements of *Witherspoon v. Illinois.*

[18] *Witherspoon* held explicitly that its rules were applicable to procedures under which juries "imposed or recommended" the death penalty. 391 U.S. at 522.

CONCLUSION

The decision and judgment of the Supreme Court of Florida affirming petitioner's conviction and sentence of death must be reversed upon one or more of the grounds urged above and the case remanded to the Florida courts for retrial.

Respectfully submitted,

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